

# Treaty Double Jeopardy: The OECD Anti-Bribery Convention and the FCPA

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## I. INTRODUCTION

Individuals and entities prosecuted for bribing foreign public officials certainly are not an appropriate object for sympathy. As the preamble to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions appropriately declares, bribery of this kind “raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions.”<sup>1</sup> The

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<sup>1</sup>Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions pmbl., Dec. 17, 1997, 37 I.L.M. 1 [hereinafter OECD Anti-Bribery Convention].

legislative history of the implementation of this treaty by the United States similarly proclaims that bribery of foreign officials “undermine[s] the goals of fostering economic development, trade liberalization, and achieving a level playing field throughout the world for businesses.”<sup>2</sup> In this light, it is entirely correct and just that governments combat international bribery with the most aggressive means at their disposal.

Of its nature, however, the crime of bribery of a “foreign” public official affects at least two separate countries (a “home” and a “host”). And for large multi-national enterprises a particular offense by a wayward employee may implicate the law of numerous sovereign states. In this respect, the worthy goal of combating trade-distorting bribery has the potential to collide with fundamental notions of fairness, and in particular with the intuition that a person should not be subject to successive prosecutions for essentially the same criminal act. This protection against “double jeopardy” proceeds from the sound, constitutionally grounded<sup>3</sup> principle that the State “with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense.”<sup>4</sup> And it matters not one whit to a defendant that the source of the double jeopardy is more than one sovereign state. As Justice Black once explained in a convincing dissent, “If double punishment is what is feared, it hurts no less for two ‘Sovereigns’ to inflict it than for one. . . . In each case, inescapably, a man is forced to face danger twice for the same conduct.”<sup>5</sup>

The question then, squarely presented, is whether multiple countries may prosecute and successively sanction the same person for the same criminal offense of “foreign” bribery based on the same act. The answer seems clear, at least as a matter of U.S. constitutional law: Under the “dual sovereignty” doctrine endorsed by the Supreme Court, the protection against double jeopardy simply does not apply.<sup>6</sup> A crime, it has reasoned, is an offense against a particular sovereign. If a single act of a defendant simultaneously violates the laws of two sovereigns, therefore, “he has committed two distinct ‘offences.’”<sup>7</sup> If, then, each sovereign prosecutes based on its own laws, such a person is not put in *double jeopardy* for the *same* offense.

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<sup>2</sup> See TOM BLILEY, INTERNATIONAL ANTI-BRIBERY AND FAIR COMPETITION ACT OF 1998, H.R. REP. NO. 105-802, at 10 (1998).

<sup>3</sup> U.S. CONST. amend. V.

<sup>4</sup> *Green v. United States*, 355 U.S. 184, 187 (1957).

<sup>5</sup> *Bartkus v. Illinois*, 359 U.S. 121, 155 (1959) (Black, J., dissenting).

<sup>6</sup> See, e.g., *Heath v. Alabama*, 474 U.S. 82, 88 (1985); *United States v. Lanza*, 260 U.S. 377, 382 (1922); see also *infra* Part III.A.

<sup>7</sup> *Heath*, 474 U.S. at 88.

In the United States, the legal foundation for the prosecution of foreign bribery is of course the subject of this symposium, the Foreign Corrupt Practices Act.<sup>8</sup> But this is no prosaic criminal statute. In its present form as amended in 1998, the FCPA reflects the implementation of the OECD Anti-Bribery Convention, a formal international treaty which the United States also ratified at the time.<sup>9</sup> This Convention specifically defines, and then obligates its member states to criminalize, two specific offenses involving a foreign public official—bribery and complicity in bribery.<sup>10</sup> Indeed, as I will explain in more detail below,<sup>11</sup> the creation of just such an obligation founded in international law was the culmination of a decades-long effort by the United States that began even before the first passage of the FCPA in 1977.

My goal here is to explore the effect, if any, of the OECD Convention on the long-standing “dual sovereignty” exception to the prohibition against double jeopardy. The dual sovereignty doctrine is founded in the notion that the establishment of a particular crime arises out of the independent authority of each sovereign—that is, from the bottom up and within the silo of domestic law. At a minimum, this rationale becomes distorted when countries establish a specifically described crime pursuant to an obligation that emanates “downward” from international law, and in specific from a formal international treaty.

Part II below sets the background for an exploration of this issue. It first describes the key elements of the OECD Convention and the U.S. implementation of the treaty through important amendments to the FCPA in 1998. It then highlights the growing significance of multiple and successive prosecutions of the same essential criminal offenses defined by the OECD Convention. The increasingly expansive U.S. interpretations of the FCPA as enhanced by the Convention—to the point of criminally sanctioning a foreign national for actions only tangentially related to the United States—amply illustrate the point.

Part III then provides a review of the dual sovereignty doctrine under U.S. constitutional law, including with reference to “international double jeopardy.” Because the contours of this doctrine are not complex, a brief summary will suffice here. Nonetheless, a basic understanding of the foundations for, and implied limitations on, the doctrine is essential for the analysis to follow. Of particular significance will be early Supreme Court declarations that the dual sovereignty doctrine may not apply where the source of criminal liability is a “universal jurisdiction” offense derived from international law.<sup>12</sup>

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<sup>8</sup> Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

<sup>9</sup> *Ratification Status as of April 2012*, ORG. FOR ECON. CO-OPERATION & DEV., <http://www.oecd.org/dataoecd/59/13/40272933.pdf> (last visited Nov. 1, 2012).

<sup>10</sup> OECD Anti-Bribery Convention, *supra* note 1, at art. 1, paras. 1–2 (both providing that the member states “shall” establish the defined offenses).

<sup>11</sup> See *infra* Part II.A.

<sup>12</sup> See *infra* notes 90–101 and accompanying text.

Part IV explores the validity of the dual sovereignty doctrine in the context of an international treaty, and in specific the offenses defined in the OECD Anti-Bribery Convention. It begins with an examination of the proposition that, in our constitutional system, a treaty may provide the foundation for double jeopardy protection.<sup>13</sup> It then reviews the basic principles of treaty law and interpretation under the U.S. Constitution.<sup>14</sup> Part IV next applies these principles to the specific crimes defined by the OECD Convention.

To be sure, the dual sovereignty doctrine is deeply entrenched in our legal system, and courts likely will be skeptical—perhaps strongly so—of a claim that a specific treaty displaces it. But I conclude that a compelling argument exists in favor of such a conclusion for the OECD Anti-Bribery Convention. The treaty creates, and obligates its member states to criminalize, two specifically defined crimes. Viewed as a matter of legal obligation, in other words, the legal source for the crimes established by the treaty's member states is international law. Consistent with the early Supreme Court observations that international law crimes reflect an exception to the dual sovereignty doctrine, therefore, I conclude that the OECD Anti-Bribery Convention may well preclude successive prosecutions of the same Convention-based offenses.

In addition to, but conceptually distinct from, this general claim founded on basic theory, the Convention's specific jurisdictional provisions may support the same result. I examine this point in the final sections of the Article.<sup>15</sup> Where two or more member states have jurisdiction over a particular offense, the Convention obligates them, upon the request of one, to consult in order to “determin[e] the most appropriate jurisdiction for prosecution.”<sup>16</sup> Without such a request, the Convention-based double jeopardy argument almost certainly is not viable. But I conclude that a stronger argument exists where one member state has specifically invoked the Convention's obligation of consultation to identify the most appropriate jurisdiction for prosecution.

International bribery, and in particular of foreign public officials, is indeed a curse, one which deserves aggressive prosecution by criminal authorities around the world. My purpose here is not to suggest otherwise. Rather, it is simply to explore whether the basic principle that a person should not “twice put in jeopardy of life or limb”<sup>17</sup> should extend as well to successive prosecutions of a single criminal offense that exists because of, and is specifically defined by, an international treaty.

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<sup>13</sup> See *infra* Part IV.A.

<sup>14</sup> See *infra* Part IV.B.1.

<sup>15</sup> See *infra* Part IV.B.2–B.3.

<sup>16</sup> OECD Anti-Bribery Convention, *supra* note 1, at art. 4, para. 3.

<sup>17</sup> U.S. CONST. amend. V.

## II. THE INTERNATIONALIZATION OF THE CRIME OF BRIBERY

The basic framework of the Foreign Corrupt Practices Act is reasonably well known, especially to the participants of this symposium. The more specific purpose of this Part, therefore, is to situate the FCPA in its international law context. Indeed, the most important provisions of the FCPA for purposes of extraterritorial enforcement resulted from a decades-long effort by the United States to internationalize the crime of bribery through binding treaty commitments. The ultimate success of that effort was the OECD Anti-Bribery Convention.

### *A. The Background and Substance of the OECD Anti-Bribery Convention*

Efforts by the United States to establish an international regime for the criminalization of bribery date from even before the adoption of the FCPA in 1977. The so-called Richardson Task Force (for Secretary of State Elliot Richardson) reported to Congress in 1976 “that the ultimate legal basis for adequately addressing the questionable payments problem must be an international treaty.”<sup>18</sup> Such a treaty, the Task Force reasoned, “is required to assure that all nations, and the competing firms of differing nations, are treated on the same basis.”<sup>19</sup> When early efforts in this direction brought little progress, Congress expressly declared in 1988 (in the process of amending the FCPA) “that the President should pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development” to create a level playing field for U.S. firms in international business transactions.<sup>20</sup> Indeed, throughout the latter half of the 20th century many of our significant trading partners—principal among them Germany and France—even permitted their exporters to take a formal tax deduction for bribes paid to foreign public officials.<sup>21</sup>

The decision to pursue a treaty under the auspices of the OECD was a deliberate one. The OECD membership includes most of the economically advanced countries in the world.<sup>22</sup> The Organization’s thirty-four member

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<sup>18</sup> *Foreign Payments Disclosure: Hearings Before the Subcomm. on Consumer Prot. & Fin. of the Comm. on Interstate & Foreign Commerce*, 94th Cong. 45 (1976).

<sup>19</sup> *Id.* at 46.

<sup>20</sup> See Foreign Corrupt Practices Act Amendments of 1988 § 5003(d)(1), Pub. L. No. 100-418, 102 Stat. 1415.

<sup>21</sup> See COMM. ON FOREIGN RELATIONS, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, S. EXEC. REP. NO. 105-19, at 12 (1998).

<sup>22</sup> The OECD thus notes that its membership “include[s] many of the world’s most advanced countries” (as well as some emerging countries such as Mexico, Chile and Turkey). *Members and Partners*, ORG. FOR ECON. CO-OPERATION & DEV.,

states, therefore, have jurisdiction over the large multi-national enterprises that are the most likely sources for “outbound” bribery of foreign public officials. Steady diplomacy by the United States within this organization ultimately bore fruit in 1998 in the form of the OECD Anti-Bribery Convention.

The treaty is surprisingly concise, with only twelve substantive provisions. It accomplishes its essential purpose in Article 1 with a specific definition of “the offence”—in two cognate forms<sup>23</sup>—of “bribery of a foreign public official.”<sup>24</sup> The same provision establishes an obligation of each ratifying state to criminalize the two specifically defined offenses through domestic implementation of the treaty.<sup>25</sup> Article 3 then declares that such offenses “shall be punishable by effective, proportionate and dissuasive criminal penalties.”<sup>26</sup> Other noteworthy provisions address money laundering,<sup>27</sup> accounting,<sup>28</sup> and required international cooperation through mutual legal assistance and extradition.<sup>29</sup>

Beyond the definition of a specific criminal offense, the most important rules of the Convention for present purposes are found in Article 4 on “Jurisdiction.” Three aspects are worthy of emphasis. First, Article 4, paragraph 1 endorses a quite broad conception of territorial jurisdiction by requiring member states to establish the legal grounds for prosecution if an offense “is committed in whole or in part in its territory.”<sup>30</sup> Second, Article 4, paragraph 2 requires that the member states, consistent with their own laws, establish the legal grounds for prosecuting their own nationals “for offences committed abroad.”<sup>31</sup> With these expansive notions, the field for overlapping exercises of jurisdiction is substantial. Finally, to address the likely conflicts when more than one member state has jurisdiction over the same offense, Article 4, paragraph 3 declares that the involved states “shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for

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[http://www.oecd.org/pages/0,3417,en\\_36734052\\_36761800\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1,00.html) (last visited Nov. 1, 2012).

<sup>23</sup> See OECD Anti-Bribery Convention, *supra* note 1, at art. 1, para. 1 (defining the crime of directly bribing a foreign public official “in order to obtain or retain business or other improper advantage in the conduct of international business”); *id.* at art. 1, para. 2 (defining the crime of “complicity in . . . or authorisation of an act of bribery of a foreign public official”).

<sup>24</sup> See *id.* at art. 1, para. 3 (stating that the two offenses are collectively referred to as “bribery of a foreign public official”).

<sup>25</sup> See *id.* at art. 1, para. 1 (declaring that “[e]ach Party shall take such measures as may be necessary to establish” the defined offense of bribery “under its law”); *id.* at art. 1, para. 2 (creating the same obligation of the offense of complicity in bribery).

<sup>26</sup> *Id.* at art. 3, para. 1.

<sup>27</sup> See *id.* at art. 7.

<sup>28</sup> See OECD Anti-Bribery Convention, *supra* note 1, at art. 8.

<sup>29</sup> See *id.* at arts. 9 and 10.

<sup>30</sup> See *id.* at art. 4, para. 1.

<sup>31</sup> See *id.* at art. 4, para. 2.

prosecution.”<sup>32</sup> For obvious reasons, this final provision will play a significant role in the analysis of double jeopardy below.<sup>33</sup>

The key message at this point is that, through the OECD Anti-Bribery Convention, the United States achieved its decades-long goal of transforming diplomatic persuasion into a formal obligation under international law. The records of the United States’ own acceptance of the treaty thus are almost triumphant in highlighting that the Convention obligates member states to criminalize the specifically defined offenses. The Senate’s Executive Committee Report consenting to ratification of the treaty in 1998 thus declared that “[t]he primary purpose of the Convention . . . is *to require* Parties to the Convention to criminalize bribery of foreign public officials.”<sup>34</sup> President Clinton’s letter transmitting the treaty to the Senate emphasized the same point.<sup>35</sup> Indeed, the Senate’s Executive Committee report underscored that “[o]f primary import” for the success of the Convention “will be the commitment of Parties to implement and enforce fully their obligations under the Convention.”<sup>36</sup>

### *B. Implementation of the OECD Anti-Bribery Convention*

The United States also was successful in securing broad acceptance of the OECD Anti-Bribery Convention with the organization’s member states. In short order, all thirty-four OECD member states ratified the Convention,<sup>37</sup> and it formally entered into force on February 15, 1999.<sup>38</sup> The next step, actual implementation of the defined treaty obligations, promptly followed. Between 1999 and early 2004, all OECD member states criminalized in their domestic law the specific crimes of “bribery of a foreign public official” defined in Article 1 of the Convention.<sup>39</sup>

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<sup>32</sup> See *id.* at art. 4, para. 3.

<sup>33</sup> See *infra* Part IV.B.

<sup>34</sup> COMM. ON FOREIGN RELATIONS, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, S. EXEC. REP. NO. 105-19, at 1 (emphasis added); see also *id.* at 2 (declaring that “[t]he Convention obligates the Parties to criminalize bribery of foreign public officials”).

<sup>35</sup> See Letter of Transmittal from President William J. Clinton to the Senate of the United States, May 4, 1998, S. TREATY DOC. No. 105-43 [hereinafter President’s Letter of Transmittal] (declaring the long efforts “to persuade other countries to adopt similar legislation [to the FCPA] . . . have resulted in this Convention that once in force, will require that the Parties enact laws to criminalize the bribery of foreign public officials”).

<sup>36</sup> COMM. ON FOREIGN RELATIONS, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, S. EXEC. REP. NO. 105-19, at 8 (1998).

<sup>37</sup> See *Ratification Status as of April 2012*, *supra* note 9. Subsequently, five non-member states of the OECD acceded to the Convention as well. See *id.*

<sup>38</sup> See *OECD Anti-Bribery Convention: Entry into Force of the Convention*, ORG. FOR ECON. CO-OPERATION & DEV., [http://www.oecd.org/document/12/0,3746,en\\_2649\\_34859\\_2057484\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/12/0,3746,en_2649_34859_2057484_1_1_1_1,00.html).

<sup>39</sup> See *Ratification Status as of April 2012*, *supra* note 9.

For its part, the Senate of the United States in 1998 promptly gave its advice and consent to ratification.<sup>40</sup> At the same time, Congress began steps to amend the FCPA to conform to the obligations set forth in the Convention. And with remarkably little controversy, the result was the International Anti-Bribery and Fair Competition Act of 1998.<sup>41</sup> Thereafter, President Clinton deposited the U.S.'s instrument of ratification of the Convention with the OECD on December 8, 1998.<sup>42</sup>

For present purposes, the most significant aspect of the amendments of the FCPA to implement the OECD Convention was a substantial expansion of the power of U.S. prosecutors to pursue alleged acts of bribery with only limited connections to the United States. The amendments accomplished this on the express foundation of the jurisdictional provisions of the Convention. The first significant change addressed the broad territorial reach of Article 4, paragraph 1 of the Convention.<sup>43</sup> The official OECD Commentaries to the Convention explain that the territorial nexus requirement under this provision "should be interpreted broadly so that an extensive physical connection to the bribery act is not required."<sup>44</sup> Fully in this spirit, the 1998 amendments added a new provision to the FCPA that extends U.S. jurisdiction to "any . . . act in furtherance of" bribery by "any person" committed in the territory of the United States.<sup>45</sup> The required territorial nexus here is thin indeed. In its first submission to the OECD on implementation of the Convention, the United States in fact declared that this new jurisdictional basis extends to any act beyond "merely conceiv[ing] the idea of paying a bribe without undertaking to do so."<sup>46</sup>

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<sup>40</sup> See S. Exec. Session, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 144 CONG. REC. S9668-01 (daily ed. July 31, 1998).

<sup>41</sup> Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified at 15 U.S.C. §§ 78dd-1 to -3, 78ff).

<sup>42</sup> See *United States-OECD Anti-Bribery Convention*, ORG. FOR ECON. CO-OPERATION & DEV., [http://www.oecd.org/document/38/0,3746,en\\_2649\\_34859\\_44583078\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/38/0,3746,en_2649_34859_44583078_1_1_1_1,00.html) (last visited Nov. 1, 2012).

<sup>43</sup> See OECD Anti-Bribery Convention, *supra* note 1, at art. 4, para. 1 (requiring the recognition of grounds for jurisdiction whenever a culpable act occurs "in whole or in part" in the territory of a member state).

<sup>44</sup> See ORG. FOR ECON. CO-OPERATION & DEV., COMMENTARIES ON THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS ADOPTED BY THE NEGOTIATING CONFERENCE para. 25 (1997), *available at* <http://www.oecd.org/dataoecd/4/18/38028044.pdf>.

<sup>45</sup> 15 U.S.C. § 78dd-3(a) (2006).

<sup>46</sup> See ORG. FOR ECON. CO-OPERATION & DEV., UNITED STATES: REVIEW OF THE IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION at 1.1.3 (1999), *available at* <http://www.oecd.org/dataoecd/16/50/2390377.pdf>. Prosecutors in fact have adopted such a broad interpretation of this jurisdictional provision. See, e.g., Information at 19, *United States v. Willbros Grp.*, No. 4:08-CR-00287 (S.D. Tex. 2008) (asserting grounds for jurisdiction based solely on a bank transfer and an email from the United States).



The second significant expansion of the FCPA on the foundation of the OECD Convention addressed “nationality” jurisdiction as provided in Article 4, paragraph 2. The implementing amendments to the FCPA expanded the Act’s scope beyond those for “issuers” and “domestic concerns” to any “United States persons.” The latter concept now broadly includes “a national of the United States . . . or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship” that is “organized under the laws of the United States or any State.”<sup>47</sup> Such persons are subject to potential criminal liability under the FCPA for an act committed anywhere in the world, including one without any U.S. territorial nexus, and even if the act occurs entirely within a foreign country.<sup>48</sup> As the Senate Report on the FCPA amendments thus emphasized at the time, this ground for jurisdiction exists even for an act “that take[s] place wholly outside the United States.”<sup>49</sup>

With these expansive jurisdictional notions endorsed—indeed required<sup>50</sup>—by the OECD Convention, multiple and successive prosecutions of the same essential offense are not only possible, but inevitable. As the next section will describe, that in fact is what is occurring in modern prosecutions of “bribery of a foreign public official” derived from the international law obligations in the OECD Convention.

### *C. The Growth of Multiple and Successive Prosecutions in the Wake of the OECD Convention*

One need not be particularly inventive to create a scenario involving multiple prosecutions of a single act of bribery on the foundation of the OECD Convention. Imagine a single alleged improper payment to a Nigerian oil minister by a sales manager of a Swiss subsidiary of a French company. Assume also that the manager is a German national and that she sent an email to the oil minister from her mobile phone while vacationing in the United States. In addition to possible action in Nigeria (which is not an OECD member), our unsuspecting sales manager may be subject to prosecution, and successive criminal penalties, for the same alleged offense in France, Switzerland, Germany, and the United States (and any other OECD member state in which she happened to find herself while communicating with the oil minister).

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<sup>47</sup> 15 U.S.C. § 78dd-2(i)(2) (2006).

<sup>48</sup> See 15 U.S.C. § 78dd-2(i)(1) (2006).

<sup>49</sup> COMM. ON FOREIGN RELATIONS, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, S. EXEC. REP. NO. 105-19, at 7 (1998).

<sup>50</sup> See OECD Anti-Bribery Convention, *supra* note 1, at art. 4, para. 1 (stating that member states “shall” take measures to establish the defined territorial jurisdiction); *id.* at art. 4, para. 2 (stating the same for the defined nationality jurisdiction).

Surprisingly, this hypothetical does not stray too widely from actual prosecutions in modern interpretations of the OECD Convention. Indeed, the treaty has been the catalyst for a substantial increase in national prosecutions in recent years. The most recent enforcement data from the organization's Working Group on Bribery reveal that in the first decade of the Convention thirteen member states have imposed criminal sanctions on nearly 200 individuals and ninety-one entities.<sup>51</sup> At least fifty-four of the sanctioned individuals were sentenced to prison for foreign bribery.<sup>52</sup> At the present time, fifteen member states are pursuing approximately 260 similar investigations.<sup>53</sup> Five states report pending criminal charges against over 120 individuals and twenty entities.<sup>54</sup>

Of this group, the United States certainly has been the most aggressive prosecutor and has employed the most expansive interpretation of its own jurisdictional authority. Between January 1998 and February 2012, the United States initiated over 100 FCPA prosecutions.<sup>55</sup> A mere sampling of these aggressive actions reveals the breadth of prosecutions with limited connections to the United States. Thus, for example, the Department of Justice has pursued or is pursuing prosecutions against a German Company and its Hungarian subsidiary for bribery of public officials in Macedonia;<sup>56</sup> against a French company for alleged bribery by three foreign subsidiaries of third-country officials;<sup>57</sup> a Swiss oil services company and its U.S.-based subsidiary for an alleged bribery scheme involving officials in numerous foreign countries;<sup>58</sup> a Nigerian subsidiary of Royal Dutch Shell Plc (a joint British-Dutch company) for bribery of Nigerian customs officials;<sup>59</sup> a Cayman Islands subsidiary of a

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<sup>51</sup> See *Working Group on Bribery: 2010 Data on Enforcement of the Anti-Bribery Convention*, ORG. FOR ECON. CO-OPERATION & DEV. (Apr. 2011), <http://www.oecd.org/dataoecd/47/39/47637707.pdf>.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See generally U.S. DEP'T OF JUSTICE, STEPS TAKEN BY THE UNITED STATES TO IMPLEMENT AND ENFORCE THE OECD ANTI-BRIBERY CONVENTION (2012), *available at* <http://www.justice.gov/criminal/fraud/fcpa/docs/2012-02-29-steps-taken-oecd-anti-bribery-convention.pdf>.

<sup>56</sup> See Press Release, U.S. Dep't of Justice, Magyar Telekom and Deutsche Telekom Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay Nearly \$64 Million in Combined Criminal Penalties (Dec. 29, 2011), *available at* <http://www.justice.gov/opa/pr/2011/December/11-crm-1714.html>.

<sup>57</sup> See Press Release, U.S. Dep't of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay \$92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010), *available at* <http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html>.

<sup>58</sup> See Press Release, U.S. Dep't of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More than \$156 Million in Criminal Penalties (Nov. 4, 2010), *available at* <http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html>.

<sup>59</sup> See *id.*

Swiss company for bribery by agents in Nigeria of Nigerian customs officials;<sup>60</sup> and another Cayman Islands subsidiary of a company headquartered in the United States for bribes paid to tax inspectors in Azerbaijan.<sup>61</sup> In the same vein, the United States sentenced to prison a non-U.S. citizen working for a non-U.S. company for bribery that occurred in Costa Rica.<sup>62</sup> The only connection to the United States was that the foreign employer had issued American Depositary Receipts (ADRs) in this country and some payments came from a U.S. bank account.<sup>63</sup>

Many of the criminal sanctions imposed by the United States (most often through settlements with the corporate entities) cover actions that other member states to the OECD Convention were prosecuting or had already punished. To pick just a few further examples, Aon Corporation, a U.K. company, accepted criminal sanctions by the United States in 2011 even though the United Kingdom had already punished the same acts of alleged bribery by its subsidiaries in 2009;<sup>64</sup> the Norwegian state oil company, Statoil, accepted criminal penalties by the United States in 2006 for bribery of Iranian officials even though Norway had already sanctioned the company for the same acts in 2004;<sup>65</sup> and the United States imposed a prison sentence on a South Korean national for bribery after South Korea had already imposed its own sanctions, and even though the United States had first expressly deferred to the proceedings in South Korea.<sup>66</sup> At the present time, Hewlett-Packard is subject to parallel investigations and potential successive penalties in Germany and the United States for alleged bribery by one of its German subsidiaries of Russian public officials.<sup>67</sup>

The message here is not that the companies involved were necessarily innocent of the alleged acts of bribery or that their employees and agents were angels. Rather, this brief sampling of past and present prosecutions is designed to illustrate the practical effects of the extremely broad jurisdictional provisions of the OECD Convention. In our modern, deeply interconnected world

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<sup>60</sup> *See id.*

<sup>61</sup> *See id.*

<sup>62</sup> *See* Press Release, U.S. Dep't of Justice, Former Alcatel CIT Executive Sentenced for Paying \$2.5 Million in Bribes to Senior Costa Rican Officials (Sept. 23, 2008), *available at* <http://www.justice.gov/opa/pr/2008/September/08-crm-848.html>.

<sup>63</sup> *See id.*

<sup>64</sup> *See* Press Release, U.S. Dep't of Justice, Aon Corporation Agrees to Pay a \$1.76 Million Criminal Penalty in Bribes to Senior Costa Rican Officials (Dec. 20, 2011), *available at* <http://www.justice.gov/opa/pr/2011/December/11-crm-1678.html>.

<sup>65</sup> *See* Press Release, U.S. Dep't of Justice, U.S. Resolves Probe Against Oil Company that Bribed Iranian Official (Oct. 13, 2006), *available at* [http://www.justice.gov/opa/pr/2006/October/06\\_crm\\_700.html](http://www.justice.gov/opa/pr/2006/October/06_crm_700.html).

<sup>66</sup> *See* *United States v. Jeong*, 624 F.3d 706, 707–08 (5th Cir. 2010). For more on this case, see *infra* notes 146–52 and accompanying text.

<sup>67</sup> *See* Hewlett-Packard, Quarterly Report (Form 10-Q) (July 31, 2010), *available at* <http://yahoo.brand.edgar-online.com/displayfilinginfo.aspx?FilingID=7453719-839-442842&type=sect&dcn=0001047469-10-007964>.

economy, the result in practical terms is that numerous countries may subject a person to successive criminal sanctions for the same criminal offense, although in each case the ultimate source of law is the Convention itself. Again, those that commit acts of foreign bribery are by no means deserving of sympathy. But as the next section will explore in more detail, the kind of multiple and successive prosecutions that the OECD Convention enables may collide directly with fundamental protections against “double jeopardy.”

### III. DOUBLE JEOPARDY AND THE “DUAL SOVEREIGNTY” DOCTRINE

#### A. *The Foundations of the Dual Sovereignty Doctrine*

The notion that an individual should not be prosecuted twice for the same crime goes back to ancient times.<sup>68</sup> For readers of this paper, the most famous modern declaration of this fundamental principle of justice (and the source of the term “double jeopardy”) is certainly the Fifth Amendment of the U.S. Constitution.<sup>69</sup> But not surprisingly, similar notions exist in other countries, most commonly under the Latin term *non bis in idem* (“not twice for the same thing”).

What might surprise is the U.S. Supreme Court’s spin on the phrase “same offense” in the Fifth Amendment. Under the so-called “dual sovereignty” doctrine endorsed by the Court, the protection against being “twice put in jeopardy of life or limb” does not extend to successive prosecutions by different sovereigns.<sup>70</sup> As Anthony Colangelo has chronicled, the Supreme Court laid the groundwork for this doctrine in a variety of cases from the 19th century.<sup>71</sup> The first definitive statement of the proposition came in a true case of multiple prosecutions for the same essential offense in *United States v. Lanza* in 1922.<sup>72</sup> There, the court upheld successive prosecutions by state and federal governments for violation of prohibition laws:

We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same

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<sup>68</sup> See Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. 769, 778–79 (2009).

<sup>69</sup> U.S. CONST. amend. V (providing that no person “shall . . . be subject for the same offence to be twice put in jeopardy of life or limb”).

<sup>70</sup> See *Heath v. Alabama*, 474 U.S. 82, 88 (1985); *United States v. Lanza*, 260 U.S. 377, 382 (1922). For more thorough examinations of the dual sovereignty doctrine, see Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 4–27 (1995); Colangelo, *supra* note 68, at 778–90; Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. REV. L. & SOC. CHANGE 383 (1986); George C. Thomas III, *Islands in the Stream of History: An Institutional Archeology of Dual Sovereignty*, 1 OHIO ST. J. CRIM. L. 345 (2003).

<sup>71</sup> See Colangelo, *supra* note 68, at 783–87.

<sup>72</sup> 260 U.S. 377, 382 (1922).

territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.<sup>73</sup>

Since then the Supreme Court has reaffirmed the dual sovereignty doctrine in a variety of possible federal–state and state–state pairings<sup>74</sup> (and even pairings involving Native American Tribes),<sup>75</sup> provided always that the successive prosecution was not by the same sovereign.

Distilled to its essence, the dual sovereignty doctrine proceeds from “the common-law conception of crime as an offense against the sovereignty of the government.”<sup>76</sup> As a result, an act defined as criminal by both national and state sovereignties may be punished by both without violating the protection against double jeopardy.<sup>77</sup> In the reasoning of the dual sovereignty doctrine, when a person contravenes the laws of two distinct sovereigns, “he has committed two distinct ‘offences.’”<sup>78</sup> Indeed, Justice Holmes once observed that the proposition that the state and federal governments may twice punish the same act “is too plain to need more than statement.”<sup>79</sup>

As this brief review indicates, the dual sovereignty doctrine arose principally within the historical context of our federal system of concurrent state and federal jurisdiction. In modern times of course, the possibility of prosecution by multiple sovereigns has assumed international dimensions. The Supreme Court has not yet formally addressed whether the dual sovereignty doctrine applies to sequential foreign and domestic prosecutions.<sup>80</sup> Nonetheless,

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<sup>73</sup> *Id.*

<sup>74</sup> See, e.g., *Heath v. Alabama*, 474 U.S. 82 (1985); *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959).

<sup>75</sup> See *United States v. Lara*, 541 U.S. 193, 199–210 (2004); *United States v. Wheeler*, 435 U.S. 313 (1978).

<sup>76</sup> *Heath*, 474 U.S. at 88.

<sup>77</sup> See *id.* at 89 (reaffirming the observation in *Lanza*, 260 U.S. at 382, that an act contrary to the criminal laws of both state and federal governments “is an offense against the peace and dignity of both and may be punished by each”).

<sup>78</sup> *Heath*, 474 U.S. at 88. The one potential caveat to the doctrine is the so-called “sham prosecution” exception. In *Bartkus v. Illinois*, 359 U.S. 121, 123–24 (1959), the Supreme Court impliedly recognized such an exception when it took seriously a defendant’s claim that a state had acted “merely [as] a tool of the federal authorities” and that the state prosecution was “a sham and a cover for a federal prosecution.” Federal courts have since been quite skeptical of the exception, however, and none has accepted it in an actual case. See, e.g., *United States v. Mardis*, 600 F.3d 693, 696–99 (6th Cir. 2010); *United States v. Barrett*, 496 F.3d 1079, 1119 (10th Cir. 2007); *United States v. Rashed*, 234 F.3d 1280, 1282–83 (D.C. Cir. 2000).

<sup>79</sup> *Westfall v. United States*, 274 U.S. 256, 258 (1927).

<sup>80</sup> The Court obliquely addressed the subject in *United States v. Balsys*, 524 U.S. 666 (1998). There, the Court held that a fear of prosecution in a foreign country generally would

the courts of appeals have uniformly found that the doctrine applies with equal vigor in the international context.<sup>81</sup>

Without more, therefore, the dual sovereignty doctrine would seem to preclude any viable claim that the double jeopardy principle is relevant to prosecutions of foreign bribery by different countries. Because each state exercises its own sovereign powers, the reasoning would run, a single act could represent a crime against each, even if the involved states define the offense with the same factual and legal elements. As the next section will explore, however, the premise of the dual sovereignty doctrine becomes unstable for the prosecution of crimes derived from international law. And, like the obligation to criminalize “bribery of a foreign public official” set forth in the OECD Anti-Bribery Convention, no form of international law is more specific and substantial than a formal treaty between sovereign states.

### *B. Examining the Dual Sovereignty Doctrine for Crimes Under International Law*

As the name implies, the justification for the dual sovereignty doctrine lies in the exercise of independent authority by independent sovereigns. Successive prosecutions of the same person for what would seem to be the same act thus do not represent “double” jeopardy where the prosecutors “draw their authority to punish the offender from distinct sources of power.”<sup>82</sup> A criminal act exists in reference to a particular sovereign state. Each state, in turn, “has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses.”<sup>83</sup> And “[f]oremost among the prerogatives of sovereignty is the power to create and enforce a criminal code.”<sup>84</sup> In short, where two or more sovereigns criminalize a particular act in exercise of their independent lawmaking prerogatives, each may prosecute without violating the prohibition on double jeopardy.

If one accepts the premise, the logic holds within our unique federal system. The states each have a sovereign power to create their own criminal codes. The same is true of the federal government. And although the Constitution makes federal law supreme over state law,<sup>85</sup> the states are under no obligation to criminalize any particular conduct simply because the federal government has

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not provide a basis for asserting the Fifth Amendment right against self-incrimination in a judicial proceeding in the United States. *See id.* at 698–99.

<sup>81</sup> *See, e.g.,* United States v. Studabaker, 578 F.3d 423, 430 (6th Cir. 2009); United States v. Rashed, 234 F.3d 1280, 1281–82 (D.C. Cir. 2000); United States v. Guzman, 85 F.3d 823, 826 (1st Cir. 1996); United States v. Baptista-Rodriguez, 17 F.3d 1354, 1362 (11th Cir. 1994); Chua Han Mow v. United States, 730 F.2d 1308, 1313 (9th Cir. 1984).

<sup>82</sup> *Heath*, 474 U.S. at 88.

<sup>83</sup> *Id.* at 89–90 (quoting United States v. Wheeler, 435 U.S. 313, 320 (1978)) (internal quotation marks omitted).

<sup>84</sup> *Id.* at 93.

<sup>85</sup> U.S. CONST. art. VI.

done so. To state the point more directly, the federal government may no more obligate the states to establish a particular crime than the states could do the same in reverse.

The matter becomes murkier, however, when one considers the force and effect of international law. The Constitution makes international treaties the “supreme Law of the Land.”<sup>86</sup> Separately, it expressly empowers the Congress to “define and punish . . . Offenses against the Law of Nations.”<sup>87</sup> As a more general (and also more controversial) point, the Supreme Court has long recognized that international law forms a direct part of our domestic law.<sup>88</sup> In appropriate cases, therefore, international law “must be ascertained and administered by the courts of justice of appropriate jurisdiction.”<sup>89</sup>

The “dual” aspect of the dual sovereignty doctrine thus becomes less clear where domestic courts directly apply international law—that is, law not solely derived from the “independent” prerogatives of a particular sovereign. The Supreme Court itself planted the seeds of thought in this direction in the 1820 case of *United States v. Furlong*.<sup>90</sup> There, the Court addressed the distinction between the separate crimes of piracy and murder. Under the prevailing view of the times, piracy was not “committed against the particular sovereignty of a foreign power[,] but . . . against all nations, including the United States.”<sup>91</sup> The Court in *Furlong* thus observed that all countries could exercise jurisdiction over piracy, whatever the state of their national criminal law, as a result of “universal jurisdiction.”<sup>92</sup> This jurisdiction, the Court reasoned, resulted from the fact that piracy, in contrast to murder, was a crime that derives directly from the “law of nations” (the terminological predecessor of international law).<sup>93</sup>

In the Court’s view, this distinction had direct implications for the doctrine of double jeopardy. Using the French term for the doctrine (“*autre fois acquitté*”—already acquitted), the Court explained that a person should not be subject to successive prosecutions in different countries for the crime of piracy—“robbery on the seas”—under international law:

Robbery on the seas is considered as an offence within the criminal jurisdiction of all nations. It is against all, and punished by all; and there can be no doubt

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at art. I, § 8, cl. 10.

<sup>88</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 730 (2004) (stating that “[i]nternational law is part of our law” (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)) (internal quotation marks omitted)).

<sup>89</sup> *Id.* (stating that international law “must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination” (quoting *The Paquete Habana*, 175 U.S. at 700) (internal quotation marks omitted)).

<sup>90</sup> 18 U.S. (5 Wheat.) 184 (1820).

<sup>91</sup> *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 152 (1820).

<sup>92</sup> *Furlong*, 18 U.S. (5 Wheat.) at 197.

<sup>93</sup> See *id.*

that the plea of *autre fois acquit* would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State.<sup>94</sup>

Even before the Supreme Court's opinion in *Furlong*, Congress had amended the federal piracy statute to provide for an express incorporation of the law of nations as the direct source of law.<sup>95</sup> In this way, Congress in effect opened the door to direct application of international law on the foundation of its constitutional power, noted above, to "define and punish . . . offenses against the Law of Nations."<sup>96</sup> The Supreme Court then promptly affirmed the power of Congress to do so with specific reference to that piracy statute.<sup>97</sup>

As a practical matter, piracy nonetheless remained the only form of international criminal law of the time. Moreover, the practice rapidly waned in significance even in the 19th century.<sup>98</sup> As a result, federal courts have not had occasion to elaborate on the views expressed in *United States v. Furlong*. Nonetheless, it would appear that the reasoning in *Furlong* remains viable, as the Fifth Circuit acknowledged in the 1978 case of *United States v. Martin*.<sup>99</sup> That case involved successive prosecutions by the Bahamas and the United States for the crime of marijuana possession. The Fifth Circuit asserted there that "[t]he Constitution of the United States has not adopted the doctrine of international double jeopardy."<sup>100</sup> But in doing so, the court, citing *United States v. Furlong*, emphasized that this was true because the criminal acts at issue were not "the subject of universal agreement among nations."<sup>101</sup>

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<sup>94</sup> *Id.*

<sup>95</sup> Act of March 3, 1819, ch. 101, § 5, 3 Stat. 510, 513–14 (codified as amended at 18 U.S.C. § 1651 (2006)) ("That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof, before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death.").

<sup>96</sup> U.S. CONST. art. I, § 8, cl. 10.

<sup>97</sup> See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158 (1820) (upholding a conviction under the piracy statute against a claim that Congress could not leave the matter to judicial interpretation); see also *United States v. Hasan*, 747 F. Supp. 2d 599, 632 (E.D. Va. 2010) (observing with reference to this piracy statute, that "when Congress enacts a statute that *expressly* incorporates customary international law into the domestic law of the United States, the federal courts are required, as with any other constitutional congressional mandate, to follow the statutory language adopted by Congress and apply customary international law").

<sup>98</sup> Unfortunately, piracy recently has made a bit of comeback. See *Hasan*, 747 F. Supp. 2d at 614 (addressing a prosecution for piracy under the 1819 statute); *United States v. Said*, 757 F. Supp. 2d 554, 557 (E.D. Va. 2010) (same). 574 F.2d 1359, 1360 (5th Cir. 1978).

<sup>99</sup> 574 F.2d 1359, 1360 (5th Cir. 1978). *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*



As a more general phenomenon, the recent rise of international criminal law also provides an occasion for a reexamination of the Supreme Court's insights in *Furlong*. As the next Part will explore, these insights may well have significant implications for the dual sovereignty doctrine in the context of crimes derived from an international treaty.

#### IV. AN ANALYSIS OF TREATY-BASED PROTECTIONS AGAINST DOUBLE JEOPARDY

At its most elemental, the intuition at the foundation of the double jeopardy clause is that the state should not be permitted to apply twice the same criminal law to the same individual for the same act. The dual sovereignty doctrine cleverly maneuvers around this intuition with the reasoning that each sovereign establishes its own law, and thus two prosecuting sovereigns, although they may seek to sanction the same act, do not apply the "same" criminal law.

In this Part, I first examine whether this reasoning holds when the source of law is an international treaty. I then explore whether, beyond general principles, the specific text of the OECD Anti-Bribery Convention confers protection against double jeopardy for the offences it defines and requires member states to incorporate into domestic law.

##### *A. Double Jeopardy and Crimes Derived from a Treaty*

It is of course possible that general norms of international law could provide protection against "international double jeopardy." Indeed, Article 14(7) of the International Covenant on Civil and Political Rights (ICCPR) expressly provides such a protection where an individual "has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."<sup>102</sup> As Anthony Colangelo has convincingly explained, however, even if such a norm has attained customary international law status, it would only prohibit successive prosecutions by the same state.<sup>103</sup> The same is true for the other non-conventional source of international legal rules—general principles of international law.<sup>104</sup> Although broad congruence exists among the domestic

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<sup>102</sup> International Covenant on Civil and Political Rights art. 14, para. 7, Mar. 23, 1976, 999 U.N.T.S. 171.

<sup>103</sup> Colangelo, *supra* note 68, at 805–15; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1)(a) (1987) (recognizing customary international law as binding). Beyond this, the Restatement (Third) of Foreign Relations Law asserts only that a state should not exercise extraterritorial jurisdiction where this would be "unreasonable." See *id.* § 403(1) (stating that "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable").

<sup>104</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 102(1)(c) (stating that a rule of international law may arise "by derivation from general principles common to the major legal systems of the world").

laws in the international community, this relates only to successive prosecutions by the same specific sovereign authority.<sup>105</sup>

Nonetheless, the key insight of *United States v. Furlong*, properly framed, is not founded on notions of human rights recognized by international law. That insight is instead directed at the “same offence” rationale of the dual sovereignty doctrine as understood and applied by courts of the United States. It proceeds from the fact that, in contrast to “dual” domestic criminal codes, crimes recognized in international law emanate from a single source of law. Where, therefore, international law provides the substantive criminal offense, successive prosecutions by two sovereigns in fact may twice put a defendant “in jeopardy of life or limb” for “the same offence.”<sup>106</sup>

Treaties represent the most concrete and specific form of international law. Their very purpose is to create formal, binding legal obligations for ratifying states.<sup>107</sup> Treaties likewise reflect a single source of law that each member state must interpret and apply in good faith.<sup>108</sup> As a matter of domestic constitutional law, the Supremacy Clause elevates “all Treaties” to the “supreme Law of the Land.”<sup>109</sup> Treaties, therefore, represent (unless their substance reflects otherwise)<sup>110</sup> a direct source of domestic law in the United States. The constitutional systems of numerous other countries recognize a similar principle.<sup>111</sup>

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<sup>105</sup> See Colangelo, *supra* note 68, at 815–19.

<sup>106</sup> U.S. CONST. amend. V. For a broader review of this argument, see Colangelo, *supra* note 68, at 799–803. See generally Dax Eric Lopez, Note, *Not Twice for the Same: How the Dual Sovereignty Doctrine Is Used to Circumvent Non Bis In Idem*, 33 VAND. J. TRANSNAT’L L. 1263 (2000).

<sup>107</sup> See Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 339 (providing that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 321 (same).

<sup>108</sup> See Vienna Convention on the Law of Treaties, *supra* note 107, at art. 26; see also RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 103, § 325 cmt. d (“Treaties that lay down rules to be enforced by the parties through their internal courts or administrative agencies should be construed so as to achieve uniformity of result despite differences between national legal systems.”).

<sup>109</sup> See U.S. CONST. art. VI.

<sup>110</sup> See *infra* notes 135–42 and accompanying text (examining the self-executing treaty doctrine).

<sup>111</sup> See Michael P. Van Alstine, *The Role of Domestic Courts in Treaty Enforcement: Summary and Conclusions*, in THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY, 555, 555–613 (David Sloss ed., 2009) (summarizing the direct enforcement of treaties in, inter alia, Germany, the Netherlands, Poland, Russia, and South Africa).

This perspective on the legal status of international treaties may carry important implications for our understanding of the force and effect of the OECD Anti-Bribery Convention.<sup>112</sup> As explored above,<sup>113</sup> the essential purpose of the Convention was to create an international obligation by its member states to establish a specifically defined crime. Indeed, the very title of the Convention's first provision uses the definite article "the" when identifying a single notion of "offence of bribery of a foreign public official."<sup>114</sup> That first provision then expressly defines the elements of the two forms of that specific offense.<sup>115</sup> It also creates a formal obligation for each member state to "establish" this specific offense.<sup>116</sup> Moreover, the OECD Commentaries for the Convention emphasize that, although the precise terminology of Article 1 is not required, the member state may not "require proof of elements beyond those which would be required to be proved if the offence were defined as in this paragraph."<sup>117</sup>

Finally, the Convention's preamble emphasizes the need for uniformity in the fulfillment of the obligation to criminalize the defined offense. It first states that "achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention."<sup>118</sup> To secure this end, the preamble declares that each member state must ratify the Convention "without derogations affecting this equivalence."<sup>119</sup> Indeed, as described above,<sup>120</sup> it was the specific goal of the United States' decades-long effort to create an express, formal obligation under international *law* that our OECD trading partners establish the specific offense now defined in the Convention.

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<sup>112</sup> Indeed, the most ambitious effort to prosecute international crimes by treaty incorporates an express double jeopardy protection. The Rome Statute of the International Criminal Court expressly precludes certain forms of successive prosecution—by that court or a national court—for crimes defined in that treaty. *See* Rome Statute of the International Criminal Court art. 20, July 17, 1998, 2187 U.N.T.S. 90 (recognizing the "*ne bis in idem*" principle).

<sup>113</sup> *See supra* Part II.A–B.

<sup>114</sup> OECD Anti-Bribery Convention, *supra* note 1, at art. 1, para. 1.

<sup>115</sup> *Id.* at art. 1, paras. 1–2.

<sup>116</sup> *Id.*

<sup>117</sup> *See* COMMENTARIES, *supra* note 44, at para. 3. The Convention leaves more discretion to the member states with regard to other issues. *See, e.g.*, OECD Anti-Bribery Convention, *supra* note 1, at art. 3, para. 1 (allowing the member states to determine "effective, proportionate and dissuasive" sanctions); *id.* at art. 5 (providing that investigation and prosecution "shall be subject to the applicable rules and principles" of each member state); *id.* at art. 6 (requiring with regard to statute of limitations only that each member state allow "an adequate period of time" for investigation).

<sup>118</sup> *See id.* at pmbl.

<sup>119</sup> *Id.*

<sup>120</sup> *See supra* notes 18–22 and accompanying text.

For the United States, the present version of the FCPA reflects a direct implementation of this international law obligation. Indeed, both the Senate and House reports on the International Anti-Bribery and Fair Competition Act of 1998 expressly state that the purpose of the FCPA amendments was to implement the OECD Anti-Bribery Convention.<sup>121</sup> The House Report states the point directly: “This legislation amends the FCPA to conform it to the requirements of and to implement the OECD Convention.”<sup>122</sup> Moreover, this legislative history—like its source, the OECD Convention itself—uses the definite article “the” to describe the specific offense Congress established in U.S. law through the conforming amendment of the FCPA.<sup>123</sup> And the greatly enhanced potential for successive prosecutions by the United States arises precisely because of the greatly expanded jurisdictional notions under the Convention.

Were any doubt to exist on the breadth of implementation, U.S. courts have long recognized a strong presumption that Congress intends its statutes to conform to international treaty obligations.<sup>124</sup> This presumption is particularly strong for statutes specifically designed to implement a treaty.<sup>125</sup> These more specific rules also operate within a general presumption that Congress intends to abide by international law.<sup>126</sup>

Properly understood, in short, the 1998 FCPA amendments reflected an incorporation of “the offense” defined by the OECD Convention. Indeed, the legislative history for the 1998 amendments explicitly states as a ground of authority the power of Congress to “define and punish . . . [o]ffenses against the Law of Nations.”<sup>127</sup> The amendments represented the fulfillment of the United

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<sup>121</sup> See S. REP. NO. 105-277, at 1 (1998) (stating the purpose of the Act was “to implement the Organization for Economic Cooperation and Development (‘OECD’) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions”); H.R. REP. NO. 105-802, at 11 (1998) (“This legislation amends the FCPA to conform it to the requirements of and to implement the OECD Convention.”).

<sup>122</sup> See H.R. REP. NO. 105-802, at 11.

<sup>123</sup> See, e.g., S. REP. NO. 105-277, at 5.

<sup>124</sup> See *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (declaring a “firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action”); *Cook v. United States*, 288 U.S. 102, 120 (1933) (“A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.”).

<sup>125</sup> See *In re Commissioner’s Subpoenas*, 325 F.3d 1287, 1305 (11th Cir. 2003) (holding that legislation designed to make the enforcement of a treaty more convenient cannot amend or abrogate the treaty); cf. *Cannon v. U.S. Dep’t of Justice*, 973 F.2d 1190, 1197 (5th Cir. 1992) (“Procedural legislation which makes operation of a Treaty more convenient cannot amend or abrogate a self-executing Treaty.”).

<sup>126</sup> See *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (declaring the presumption that “Congress ordinarily seeks to follow” “principles of customary international law”); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”).

<sup>127</sup> See S. REP. NO. 105-277, at 3 (1998) (citing U.S. CONST. art. 1, § 8, cl. 10).

States' international obligations under the Convention. To fulfill their respective obligations, the other member states did the same thing. And in each case, the member states were required to incorporate the Convention's defined offense "without derogations affecting th[e] equivalence" among them.<sup>128</sup>

This perspective undermines a principal justification for the "dual sovereignty" approach to double jeopardy. The OECD Convention represents the ultimate source of law for the specific offense it defines. Each member state fulfills its international law obligation under the Convention by incorporating that specific offense into its domestic law. And once each member state has assumed the international law obligation, it is to that extent—in the words of the decisive Supreme Court opinion on the dual sovereignty doctrine—no longer "independently . . . determin[ing] what shall be an offense against its authority."<sup>129</sup>

In turn, the incorporation by each member state of the specific elements defined in the Convention makes clear that successive prosecutions satisfy the factual predicates for double jeopardy protection. The Supreme Court's established *Blockburger* test for double jeopardy focuses on whether two criminal statutes involve the "same elements."<sup>130</sup> As the Court explained in *United States v. Dixon*, this "same-elements test . . . inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution."<sup>131</sup> This is certainly the case for criminal offenses under the OECD Anti-Bribery Convention, which specifically defines the elements of "the offense" that all member states must incorporate into their domestic law.

If two member states prosecute the same person for the same act as defined by the Convention, therefore, a compelling argument exists that they are twice putting the person in jeopardy for the same offense. As a matter of emphasis, this is not merely a case of parallel criminal offenses under domestic law. In the spirit of *United States v. Furlong*, rather, the ultimate, singular source for "the offense" is the international law reflected in the Convention.

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<sup>128</sup> OECD Anti-Bribery Convention, *supra* note 1, at pmb1.

<sup>129</sup> *Heath v. Alabama*, 474 U.S. 82, 89 (1985) (quoting *United States v. Wheeler*, 435 U.S. 313, 320 (1978)).

<sup>130</sup> *See United States v. Dixon*, 509 U.S. 688, 696 (1993) (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

<sup>131</sup> *Dixon*, 509 U.S. at 696; *see also Texas v. Cobb*, 532 U.S. 162, 172–73 (2001) (also endorsing this "*Blockburger* test"); *Rutledge v. United States*, 517 U.S. 292, 297 (1996) (same).

To be sure, this argument is not airtight. A skeptic will immediately respond, and with some force, that member states retain the formal power—should they choose to breach their legal obligations—not to implement the Convention. Even if international law provides the substantive content of the offense, the skeptic will argue, the “ultimate source of power”<sup>132</sup> to create the crime of bribery of a foreign public official is the legislative authority of each state. Dual sovereignty remains.

The argument of “treaty double jeopardy” nonetheless is worthy of serious attention by the defense bar and the courts. The OECD Anti-Bribery Convention defines a specific offense and simultaneously creates an international law obligation to establish that specific offense—without derogations—in domestic law. Where the member states fulfill their legal obligations by implementing the treaty, therefore, they are incorporating the international law reflected in the Convention. Such an act, to return to the metaphor suggested in the Introduction, does not reflect the traditional premise of a sovereign state independently creating a crime from the bottom up and within the silo of domestic law. The proper way to conceive of the act, rather, is as an incorporation of single criminal offense that emanates “downward” from international law. In such a case, a compelling argument may well exist that two OECD member states may not subject one person to prosecution for “the same offense” defined therein.<sup>133</sup>

## *B. The Provisions of the OECD Anti-Bribery Convention as a Separate Source of Double Jeopardy Protection*

### *1. The Principles of Treaty Interpretation*

Part IV.A above examined the general norms that may found a protection against double jeopardy for treaty-based offenses. Here, I turn to the specific terms of the OECD Convention. The distinction is subtle, but significant. Wholly apart from the constitutional principles explored above, a treaty may, by its own terms, establish protections against successive prosecution. As the D.C. Circuit has correctly observed, “[i]t is certainly possible that a treaty could contain a double jeopardy provision more restrictive—that is, barring more prosecutions—than the Constitution’s Double Jeopardy Clause.”<sup>134</sup>

The foundation for such a result lies in the concept of a self-executing treaty. Recall that the Supremacy Clause provides that “all Treaties” are supreme federal law.<sup>135</sup> On this basis, since the very founding of the Republic the President has concluded and the Senate has given its consent to treaties that create rights or obligations directly enforceable by individuals in domestic

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<sup>132</sup> *Heath*, 474 U.S. at 90 (quoting *Wheeler*, 435 U.S. at 320).

<sup>133</sup> See U.S. CONST. amend. V.

<sup>134</sup> *United States v. Rezaq*, 134 F.3d 1121, 1128 (D.C. Cir. 1998).

<sup>135</sup> U.S. CONST. art. VI.

courts.<sup>136</sup> The self-executing treaty doctrine is one of the most animated subjects of modern scholarly and judicial debate. But it will suffice at this point to observe, as the Supreme Court recently reiterated, that a treaty of this type “operates of itself” as domestic law “without the aid of any legislative provision.”<sup>137</sup> On the other hand, some treaties (“non-self-executing” treaties) from text or context may not function as domestic law in this direct way.<sup>138</sup>

The difficult distinction between the two types of treaties requires resort to the basic principles of treaty interpretation. “The interpretation of a treaty,” the Supreme Court recently observed, “begins with its text.”<sup>139</sup> But this inquiry also unfolds within the important context that a treaty by its nature is “an agreement among sovereign powers.”<sup>140</sup> From this, the Court has reasoned that the key goal of interpretation is “to read the treaty in a manner ‘consistent with the shared expectations of the [treaty] parties.’”<sup>141</sup> To this end, in interpreting a treaty the courts may consider its “negotiation and drafting history” as well as “the postratification understanding” of the member states.<sup>142</sup> Finally, with regard to the specific issue of self-execution, the Supreme Court has focused on “whether a treaty’s terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.”<sup>143</sup>

The text of the OECD Anti-Bribery Convention in fact provides important material for analysis on the possible invocation of double jeopardy protections. As I described in Part II.B. above, the United States incorporated, from Article 4 of the Convention, quite broad notions of territoriality and nationality as foundations for an exercise of criminal jurisdiction.<sup>144</sup> But in return, Article 4, paragraph 3—under the general heading of “Jurisdiction” in Article 4—directly

<sup>136</sup> For a comprehensive review of the over 500 treaties that function as domestic law in this way, see Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 921–23 (2004).

<sup>137</sup> *Medellín v. Texas*, 552 U.S. 491, 505 (2008) (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829)); see also *id.* at 505–06 (observing that self-executing treaty provisions have “the force and effect of a legislative enactment” (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888))); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801).

<sup>138</sup> As the Supreme Court observed in *Medellín*, the point of a non-self-executing treaty is that it “addresses itself to the political, *not* the judicial department; and the legislature must execute the contract before it can become a rule for the Court.” 552 U.S. at 516 (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829)).

<sup>139</sup> *Medellín*, 552 U.S. at 506–07 (citing *Air France v. Saks*, 470 U.S. 392, 396–97 (1985)).

<sup>140</sup> *Id.* at 507 (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)); see also *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522, 533 (1987).

<sup>141</sup> *Olympic Airways v. Husain*, 540 U.S. 644, 650 (2004) (quoting *Air France v. Saks*, 470 U.S. 392, 399 (1985)).

<sup>142</sup> *Medellín*, 552 U.S. at 507; see also *El Al Israel Airlines Ltd. v. Tseng*, 525 U.S. 155, 167 (1999); *Zicherman*, 516 U.S. at 226.

<sup>143</sup> *Medellín*, 552 U.S. at 521.

<sup>144</sup> See *supra* notes 43–50 and accompanying text.

addresses the very real possibility of jurisdictional competition for prosecution of “the offense” defined in the Convention. Because of this, the provision is worthy of full quotation here: “When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.”<sup>145</sup>

The most conspicuous language of this provision is the singular phrase at the end, “the most appropriate” jurisdiction for prosecution. This superlative, however, is subject to the important predicate of a “request” by an interested member state. Different consequences thus may attach depending on the existence of such a request. In the sections to follow, therefore, I will analyze in turn each of the two alternatives.

## *2. Treaty-Based Protection Without a Request for Consultation by Another Member State*

We may easily dispense with the possibility that Article 4, paragraph 3 alone creates a self-executing protection against double jeopardy without a corresponding request by at least one member state. To be sure, the provision uses the language of obligation (“shall . . . consult”). Nonetheless, the provision clearly contemplates a formal request by another interested member state as necessary condition. That is, even the obligation to consult is only triggered “at the request” of another member state. Even if the provision creates self-executing private rights, therefore, such a formal request is a predicate to any possible identification of “the most appropriate jurisdiction for prosecution.”

The Fifth Circuit in *United States v. Jeong* recently addressed this very issue and reached the same conclusion.<sup>146</sup> At issue there was a South Korean national who was first convicted and sentenced in South Korea for bribing American public officials to secure a telecommunications contract.<sup>147</sup> Thereafter, U.S. officials induced Jeong to travel to this country and then promptly indicted him for the same bribery scheme.<sup>148</sup> Because South Korea is also member state to the OECD Anti-Bribery Convention, Jeong raised Article 4, paragraph 3 as a bar against successive prosecution by the United States.<sup>149</sup>

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<sup>145</sup> OECD Anti-Bribery Convention, *supra* note 1, at art. 4, para. 3.

<sup>146</sup> See *United States v. Jeong*, 624 F.3d 706, 711 (5th Cir. 2010).

<sup>147</sup> *Jeong*, 624 F.3d at 707.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 710–11.



The Fifth Circuit rejected this argument based on “the plain language of Article 4.3.”<sup>150</sup> “The phrase ‘at the request of one of them,’” the court reasoned, “is a dependent clause that conditions the consultation requirement on the existence of a request.”<sup>151</sup> Because neither the United States nor South Korea had made such a formal request before prosecution by either, the court concluded that Article 4, paragraph 3 simply did not apply.<sup>152</sup>

The Fifth Circuit’s reasoning in *Jeong* is eminently convincing. Basic principles of treaty interpretation require primary resort to a treaty’s text, and that text seems clear. But even reference to extrinsic sources such as drafting history does not undermine this conclusion. No formal *travaux préparatoires* exists for the Convention.<sup>153</sup> And although the OECD produced official “Commentaries,” these contain no explanatory material on Article 4, paragraph 3.<sup>154</sup> Likewise, neither the analysis prepared by the U.S. State Department<sup>155</sup> nor the Senate Executive Report on the treaty addresses the issue.<sup>156</sup> We are left, then, with the text. That text leaves little room for an argument of treaty-based double jeopardy protection in absence of a formal “request” for consultation by a competing member state.

### 3. Treaty-Based Protection with a Request for Consultation by Another Member State

The provisions of the OECD Convention nonetheless may support a strong double jeopardy argument where another state with jurisdiction formally requests consultation to determine “the most appropriate jurisdiction for prosecution.”<sup>157</sup> Before turning to the specifics of this argument, however, our analysis may benefit from a reminder that this issue is independent of the constitutional argument outlined in Part III.A above. That Part examined whether basic constitutional principles create double jeopardy protections when an international treaty is the source of law for a specifically defined criminal offense. Although this examination provides a valuable context, an argument founded on the specific language of the OECD Anti-Bribery Convention is distinct from, and in addition to, the general constitutional principles that address the relationship between international law and our domestic legal

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<sup>150</sup> *Id.* at 711.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *OECD Anti-Bribery Convention: OECD Guidelines for Multinational Enterprises: Frequently Asked Questions for 2011 Jessup Competitors*, ORG. FOR ECON. CO-OPERATION & DEV., <http://www.oecd.org/dataoecd/22/1/46510795.pdf> (last visited Sept. 8, 2012).

<sup>154</sup> See COMMENTARIES, *supra* note 44, at paras. 25–26.

<sup>155</sup> See President’s Letter of Transmittal, *supra* note 35, at VII.

<sup>156</sup> See COMM. ON FOREIGN RELATIONS, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, S. EXEC. REP. NO. 105-19, at 4 (1998).

<sup>157</sup> OECD Anti-Bribery Convention, *supra* note 1, at art. 4, para. 3.

system. This is the message of the D.C. Circuit's insight, noted above, that a treaty *itself* may contain a double jeopardy "provision" that is "more restrictive . . . than the Constitution's Double Jeopardy Clause."<sup>158</sup>

Here as well, we of course begin with the text. Recall first that Article 4, paragraph 3 functions within the general subject of "Jurisdiction" covered by Article 4 as a whole. And, significantly, both article 4, paragraph 1 (on territorial jurisdiction) and Article 4, paragraph 2 (on nationality jurisdiction) focus on "the" specific offense of "bribery of a foreign public official" as defined in the Convention. Thus, Article 4, paragraph 1 extends jurisdiction based on territory only when "the offence" is committed in whole or in part in a member state. Article 4, paragraph 2 does the same with respect to nationality jurisdiction. With this background, Article 4, paragraph 3 prescribes a rule to address "[w]hen more than one Party has jurisdiction" over this specific offence "described in this Convention."

Where one such member state makes a corresponding request, the provision states an obligation: The competing states "shall . . . consult." It also identifies the purpose of the obligation: "with a view to determining the most appropriate jurisdiction for prosecution."<sup>159</sup> The Fifth Circuit in *Jeong*, in dicta, also addressed whether such a request would have altered its analysis. In doing so, however, the court focused exclusively on words "*with a view*."<sup>160</sup> Seeing this language as aspirational only, the court concluded that, even if a member state makes a formal request for consultation, Article 4, paragraph 3 ultimately reflects no obligation, and thus no individual protection, at all.<sup>161</sup>

A more careful analysis suggests, however, that this assessment is too hasty and the analysis too superficial. The language "with a view to determining" is indeed ambiguous. It could have only a weak sense of "aiming toward," but could also have a strong sense of "in order to." Unfortunately, as noted above the available background records from the OECD and the U.S. ratification process offer no guidance on this score.<sup>162</sup> A number of considerations nonetheless suggest that a properly situated defendant could make a strong

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<sup>158</sup> *United States v. Rezaq*, 134 F.3d 1121, 1128 (D.C. Cir. 1998). Such treaty-based protections are by no means unusual. A prominent example is extradition treaties, which commonly preclude extradition to a foreign country when the basis for the request is a crime for which the person has already been convicted or acquitted. See MICHAEL ABBELL, EXTRADITION TO AND FROM THE UNITED STATES 109 (2010) ("With two exceptions, all United States extradition treaties negotiated since World War II contain provisions prohibiting the extradition of persons convicted, acquitted, or being tried in the requested country for the same acts or offenses for which their extradition is requested."); see also U.N. Model Treaty on Extradition, G.A. Res. 45/116, art. 3(d), U.N. Doc. A/RES/45/116 (Dec. 14, 1990) (providing the same protection).

<sup>159</sup> OECD Anti-Bribery Convention, *supra* note 1, at art. 4, para. 3.

<sup>160</sup> *United States v. Jeong*, 624 F.3d 706, 711 (5th Cir. 2010).

<sup>161</sup> *Id.* at 711–12 (so stating, and concluding that "the provision requires nothing more than consultation upon request; it does not require any additional actions of the party countries").

<sup>162</sup> See *supra* notes 153–56 and accompanying text.

argument that Article 4, paragraph 3 creates a protection against double jeopardy—although of course only for a single offense as defined in the OECD Convention and only after a formal request by another member state with jurisdiction.

First, the language of the provision is obligatory (“shall”), a consideration the Supreme Court highlighted in its most recent decision on the self-execution doctrine.<sup>163</sup> Second, the equally official French language text of the treaty indicates that the legal consequence of a request for consultation is a required end of determining “the most appropriate jurisdiction for prosecution.” In specific, the French language version of Article 4, paragraph 3 (“*afin de décider*”) reflects a sense of “in order to decide.” This connects the obligation of consultation with a specific, required outcome—a determination of “the most appropriate jurisdiction for prosecution.”

In addition, some indications from the “postratification understanding” of the parties to the Convention support a protective meaning in Article 4, paragraph 3.<sup>164</sup> In 2007, for example, the OECD held an “Expert Meeting” on the Convention, one purpose of which was to address “Enhanced International Co-ordination and Co-operation.”<sup>165</sup> At this conference, the Chair of the OECD’s Working Group on Bribery presented a paper that expressly recognized that Article 4, paragraph 3 creates a protection against double jeopardy: “Once a definitive court ruling has been handed down in one of the States, at latest, proceedings underway in the other States should cease. Otherwise, this could result in violation of the principle of double jeopardy or *ne bis in idem*.”<sup>166</sup> Moreover, at least one OECD member state, South Korea, has taken the explicit stance that Article 4, paragraph 3 creates such a protection.<sup>167</sup>

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<sup>163</sup> See *Medellín v. Texas*, 552 U.S. 491, 508 (2008) (reasoning that the treaty at issue there was not self-executing because it did not “provide that the United States ‘shall’ or ‘must’” take a specific action).

<sup>164</sup> See *supra* note 142 and accompanying text.

<sup>165</sup> See *Agenda: Experts’ Meeting: The OECD Anti-Bribery Convention: The Road Ahead*, ORG. FOR ECON. CO-OPERATION & DEV. (Nov. 21, 2007), <http://www.oecd.org/dataoecd/8/35/39769918.pdf>.

<sup>166</sup> Mark Pieth & Juliette Leliuer, *Strengthening International Coordination and Cooperation*, ORG. FOR ECON. CO-OPERATION & DEV. (Nov. 21, 2007), <http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/39691044.pdf>.

<sup>167</sup> See Brief for Appellant at 38, *United States v. Jeong*, 624 F.3d 706 (5th Cir. 2010) (No. 09-11127) (observing that the Republic of Korea had declared in a submission to the court, “[i]t is our view that the [OECD Anti-Bribery] Convention prohibits prosecution in more than one jurisdiction for the same offenses (prohibition of double jeopardy)”).

One can also contrast the more muscular language of Article 4, paragraph 3 with similar provisions in other anti-corruption treaties. The parallel provision in the widely accepted United Nations Convention Against Corruption (with 161 member states),<sup>168</sup> for example, only requires that the parties, “as appropriate, consult one another with a view to coordinating their actions.”<sup>169</sup> The UN Convention Against Transnational Organized Crime contains the same weak language.<sup>170</sup> At the risk of emphasizing the obvious, neither similar treaty states as a requirement a determination of “the most appropriate jurisdiction for prosecution.”<sup>171</sup>

The United States also ratified the OECD Anti-Bribery Convention with no provision purporting to limit its force as directly applicable (i.e., self-executing) domestic law.<sup>172</sup> President Clinton’s Letter of Transmittal to the Senate has no language to that effect.<sup>173</sup> But a more significant matter is the absence of any corresponding reservation, understanding, or declaration (so-called RUDs) by the Senate as part of its resolution of consent to ratification of the OECD Convention.<sup>174</sup> By the late 1990s, the Senate had a well-established practice of declaring, in the case of any doubt, that a treaty it was approving was non-self-executing or at least did not create private rights.<sup>175</sup> No such thing happened with the OECD Anti-Bribery Convention. Indeed, the State Department expressly confirmed in testimony to the Senate at the time that at least some provisions in the Convention are self-executing.<sup>176</sup>

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<sup>168</sup> *UNCAC Signature and Ratification Status*, UN OFFICE ON DRUGS AND CRIME (July 12, 2012), <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>.

<sup>169</sup> United Nations Convention Against Corruption, G.A. Res. 58/4, art. 42, para. 5, U.N. Doc. A/RES/58/4, at 22 (Nov. 21, 2003).

<sup>170</sup> United Nations Convention Against Transnational Organized Crime, annex I, art. 15, para. 5, G.A. Res. 55/25, U.N. Doc. A/RES/55/25, at 13 (Jan. 8, 2001).

<sup>171</sup> In contrast, the Council of Europe’s Convention on Cybercrime has a provision identical to Article 4, paragraph 3 in the OECD Anti-Bribery Convention. *See* Convention on Cybercrime art. 22(5), Nov. 23, 2001, C.E.T.S. No. 185 (requiring consultation “with a view to determining the most appropriate jurisdiction for prosecution”).

<sup>172</sup> Substantial, well-founded doubt exists over whether a treaty may establish a crime on its own (i.e., whether such a treaty could be “self-executing”). Whatever the correct answer to that question, self-executing treaties have throughout history created rights in favor of individuals, and that is the argument with respect to Article 4, paragraph 3.

<sup>173</sup> *See* President’s Letter of Transmittal, *supra* note 35.

<sup>174</sup> *See* Exec. Session, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 144 CONG. REC. S9668-01 (daily ed. July 31, 1998).

<sup>175</sup> *See* Curtis Bradley & Jack Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 419 (2000) (observing that by the 1990s the Senate had a well-established practice, at least with regard to human rights treaties of including “declarations stating that the substantive provisions of the treaties are not self-executing,” which declarations were “designed to preclude the treaties from being enforceable in U.S. courts in the absence of implementing legislation”).

<sup>176</sup> *See* COMM. ON FOREIGN RELATIONS, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, S. EXEC. REP. NO. 105-19, at 78 (1998).

The view that the OECD Convention provides some level of double jeopardy protection also finds support in the traditional principle of “liberal” treaty construction. An outgrowth of the obligation of good faith performance,<sup>177</sup> this canon of treaty interpretation holds that, in cases of doubt, domestic courts should interpret a treaty in a way protective of private rights. Thus, as the Supreme Court declared in the 1879 case of *Hauenstein v. Lynham*, “[w]here a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred.”<sup>178</sup> A half century later, the Court explained the broader foundations for this doctrine in *Factor v. Laubenheimer*: “Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well,” the court reasoned, “require that obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them.”<sup>179</sup> As I have explained elsewhere,<sup>180</sup> the modern Supreme Court has not applied this notion with vigor, but neither has it expressly rejected it. This interpretive presumption would thus support a reading of Article 4, paragraph 3 of the OECD Convention in favor of double jeopardy protections—provided, of course, that another member state with jurisdiction requests in advance a formal determination of “the most appropriate jurisdiction for prosecution.”

On the other hand, a recent restrictive attitude of some federal courts on the force of treaties may support a more jaundiced view. Some federal courts have recognized, without supporting authority, a presumption that treaties do not create private rights.<sup>181</sup> Separately, the Supreme Court has long observed that the executive branch’s interpretation of a treaty “is entitled to great weight,”<sup>182</sup> and it is a near certainty that the executive branch will assert that the language of Article 4, paragraph 3 places no limits on its prosecutorial powers. Finally, a skeptic will acknowledge the language of obligation in Article 4, paragraph 3 (“shall”) but nonetheless focus on the operative verb only (“consult”). If one does not connect this verb with a required outcome (as the equally authentic French language version does), the language of Article 4, paragraph 3 merely creates an obligation of discussion. All that would then remain is some version

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<sup>177</sup> See *supra* note 109 and accompanying text (citing, inter alia, the Vienna Convention on the Law of Treaties, *supra* note 107, at art. 26).

<sup>178</sup> 100 U.S. 483, 487 (1879).

<sup>179</sup> 290 U.S. 276, 293 (1933).

<sup>180</sup> See Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1911–14 (2005).

<sup>181</sup> See, e.g., *United States v. Emuegbunam*, 268 F.3d 377, 389 (6th Cir. 2001) (declaring that “[a]s a general rule . . . international treaties do not create rights that are privately enforceable in the federal courts”); *United States v. Jimenez-Nava*, 243 F.3d 192, 195–96 (5th Cir. 2001) (same); see also *Medellín v. Texas*, 552 U.S. 491, 506 n.3 (2008) (citing this authority).

<sup>182</sup> See, e.g., *Medellín*, 552 U.S. at 513 (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982)); *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999).

of international “comity.”<sup>183</sup> But this notion is discretionary only and would allow, but not require, U.S. authorities to decline to prosecute a defendant already convicted of the same crime by another OECD member state.<sup>184</sup>

Nonetheless, as I have suggested above, a talented advocate could construct a compelling argument that Article 4, paragraph 3 of the OECD Anti-Bribery Convention alone creates a protection against double jeopardy among the member states. Where, therefore, another member state makes a corresponding formal request, a strong argument may exist that the involved member states must identify “the most appropriate jurisdiction” among them for prosecution of the specific offense defined in the Convention, and that double jeopardy should attach to any bona fide prosecution by the chosen jurisdiction.

#### IV. CONCLUSION

Bribery is a scourge, the more so when it involves the corruption of a “foreign public official”<sup>185</sup> in “the performance of official duties.”<sup>186</sup> Nonetheless, the pursuit of even highly worthy goals such as combating corruption must unfold within the bounds of fundamental principles of justice. And few principles are as fundamental as a protection against being “twice put in jeopardy of life or limb.”<sup>187</sup> It was for this reason that a report of world business leaders recently recommended, in connection with the 2011 G20 Summit in Cannes, France, that “[t]he principle contained in Article 4.3 of the OECD [anti-bribery] convention ... should be ‘translated’ into a more immediate and effective rule of international *ne bis in idem* to be introduced in

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<sup>183</sup> As the Supreme Court observed in *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895), “Comity” . . . is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.” International comity begins with the principle that statutes—and even more treaties—“should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law.” *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting in part). Indeed, as Justice Scalia observed in *Hartford Fire*, this principle has specific reference to the extraterritorial application of criminal statutes. See *Hartford Fire*, 509 U.S. at 818 (specifically relying on the principle in the Restatement (Third) of Foreign Relations § 403(1) that a state should not exercise extraterritorial jurisdiction where this would be “unreasonable”). For a more general review of international comity, see Joel R. Paul, *Comity in International Law*, 32 HARV. INT’L L.J. 1, 4 (1991).

<sup>184</sup> The U.S. Department of Justice in fact has a policy relating to federal prosecution following a conviction under state criminal law. Named after *Petite v. United States*, 361 U.S. 529 (1960), this “Petite Policy” “establishes guidelines for the exercise of discretion by appropriate officers of the Department of Justice in determining whether to bring a federal prosecution based on substantially the same act(s) or transactions involved in a prior state or federal proceeding.” See U.S. Dep’t. of Justice, Attorney’s Manual § 9-2.031(A) (2011).

<sup>185</sup> See OECD Anti-Bribery Convention, *supra* note 1, at art. 1, para. 4(a).

<sup>186</sup> See *id.* at art. 1, para. 1.

<sup>187</sup> U.S. Const. amend. V.

the various anti-bribery national acts and legislation.”<sup>188</sup> A recent comprehensive report by the International Bar Association advanced a similar recommendation.<sup>189</sup>

As a matter of domestic constitutional law, the established “dual sovereignty” doctrine bars any general claim of international double jeopardy protection. I have suggested here, however, that the courts may need to refine their thinking about this doctrine in light of the modern phenomenon of treaty-based crimes. In such cases, the law that defines the criminal act derives, contrary to a principal justification for the dual sovereignty doctrine, from a single source: international law. That is, the ultimate source of the law is a binding legal obligation under which member states have consensually limited their sovereign powers as a matter of international law. And if this view has merit, the OECD Anti-Bribery Convention would seem to be a prime example, for it defines a specific offense and obligates member states to incorporate into domestic law that specific offense without derogation.

As a separate matter, the specific terms of Article 4, paragraph 3 of the OECD Convention also may create double jeopardy protections. This is not the case without a corresponding formal request by another member state. But I have suggested here that a compelling double jeopardy argument may exist where one state has formally requested the identification of “the most appropriate jurisdiction for prosecution” of a specific offense defined in the Convention. Even this argument, however, may well founder against the recent restrictive attitude of some U.S. courts on the interpretation of treaties.

Even if a valid claim of treaty-based double jeopardy claim were to exist, its scope would be limited. First, it would extend only to a successive prosecution of the specific substantive offense defined by the OECD Convention. Moreover, the Convention covers only so-called “supply-side” bribery and thus would not provide double jeopardy protection with respect to past convictions by the “host” country—or indeed by any other non-member state to the Convention. Finally, double jeopardy protection would not extend to other or multiple criminal acts, whether based on domestic statutes or the Convention itself.

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<sup>188</sup>CANNES B20 BUS. SUMMIT, FINAL REPORT WITH APPENDICES at A-88 (2011), available at <http://www.b20.fr/uploads/presse/Final-Report-with-with-appendices-B20-2011.pdf>.

<sup>189</sup>See INT’L BAR ASS’N, REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 262 (recommending “that a protocol be developed under the auspices of the OECD” that “include[s] a double jeopardy component . . . triggered by final action in the most appropriate jurisdiction”).

Nonetheless, the distilled message here is that the modern phenomenon of treaty-based criminal law may require courts and scholars to refine their understanding of international double jeopardy. The argument is neither clean nor clear. But much room for skillful, zealous advocacy exists for lawyers who represent defendants in successive OECD Anti-Bribery Convention prosecutions.



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